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Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

ATP OIL & GAS CORPORATION

Petitioner,

vs.

DEPARTMENT OF THE INTERIOR; MINERALS MANAGEMENT SERVICE, NOW KNOWN AS BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION AND ENFORCEMENT ("BOEM"); KEN SALAZAR, SECRETARY OF THE DEPARTMENT OF THE INTERIOR; MICHAEL R. BROMWICH, DIRECTOR OF BOEM; LARS T. HERBST, REGIONAL DIRECTOR OF THE GULF OF MEXICO OCS REGION, BOEM

Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION NO. 1:

Whether an agency prevents effective judicial review under the Administrative Procedure Act when its intra-agency appellate board denies the appellant's request to hold an evidentiary fact hearing and then issues a decision, upholding the decision of the subordinate agency, that flatly contradicts, without notice or an opportunity to respond, the position that the subordinate agency took regarding a material fact at the time it engaged in regulatory action with the appellant. A conflict exists on this issue between the Fifth Circuit, which, in the present case, upheld the appellate board's divergence from the prior subordinate agency action without a fact hearing or reasoned explanation, and the D.C., Seventh and Ninth Circuits, which have only upheld such divergence after a full fact hearing and upon reasoned explanation.

QUESTION NO. 2:

Whether the courts below erred in upholding the Defendants' *post hoc* revisions to the BOEM's Lack-of-Rig policy for granting extensions to federal oil and gas leases, which were made in an effort to retroactively justify the BOEM's denial of this policy to Petitioner ATP, where such *post hoc* revisions were predicated on the inherent lack of sufficient clarity in the regulatory vehicle known as the Notice to Lessees, or "NTL", which is used extensively by the BOEM for such federal leases. A conflict exists on this issue between the Fifth and Tenth Circuits,

which allow such *post hoc* revisions to agency policy statements without a formally promulgated and published change, and the District of Columbia ("D.C.") and Seventh Circuits, which require a formally promulgated and published revision.

LIST OF PARTIES

The Plaintiff – Appellant in the proceedings before the United States Court of Appeals for the Fifth Circuit was ATP Oil & Gas Corporation ("ATP"). ATP states that it has no parent company and that, for purposes of this disclosure, ATP is considered to be its own parent company, and no publicly held entity holds ten percent or more of its stock.

Defendants – Appellees were the United States Department of the Interior, Minerals Management Service, now known as Bureau of Ocean Energy Management, Regulation and Enforcement; Ken Salazar, Secretary of the Department of the Interior; Michael R. Bromwich, Director of the Bureau of Ocean Energy Management, Regulation and Enforcement; Lars T. Herbst, Regional Director of the Gulf of Mexico OCS Region, Bureau of Ocean Energy Management, Regulation and Enforcement.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was marked not for publication, and therefore is reprinted in the appendix hereto at pages App. 1a-3a. The opinion of the United States District Court for the Eastern District of Louisiana, also unreported, is reprinted in the appendix hereto at pages App. 37a-55a.

I. BASIS FOR JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued and filed on September 23, 2010. Petitions for rehearing and rehearing en banc were filed on November 5, 2010 and November 8, 2010 respectively, and denied by the court of appeals on November 30, 2010. The court of appeals order is reprinted in the appendix hereto at pages App. 58a-60a. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §1651.

II. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Administrative Procedure Act, 5 U.S.C. §500 *et seq.* App. 63a-64a, 67a, 68a-70a, 71a-72a.

Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* App. 65a-66a.

Code of Federal Regulations, 30 C.F.R. §250.103. App. 73a-74a.

III. STATEMENT OF THE CASE

A. Overview.

This case presents two important issues of first impression for this Court concerning the standards for final administrative agency review of a subordinate agency decision. Under well-established precedent of this Court, the Defendant Secretary of the Interior violated Petitioner ATP's fundamental rights to judicial review under the Administrative Procedure Act, ("APA"), 5 U.S.C. §500 *et seq.* And, by applying standards in conflict with other Circuit Courts, principally, the D.C., Seventh and Ninth Circuits, the courts below erred in upholding the Defendants' conduct which violated Petitioner ATP's rights under the APA, as articulated by this Court through the *Whole Record Doctrine* under §706 of the APA and under this Court's clear mandates in *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87 (1943) and *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487-88 (1951).

This case is an action for judicial review of the written denial issued on August 29, 2006 by the Bureau of Ocean Energy Management Regulation and Enforcement, ("BOEM" acting under its prior name, the Minerals Management Service or "MMS"), of a request by Petitioner ATP for a 60 day extension of its oil and gas lease located in the Gulf of Mexico and issued under the Outer Continental Shelf Lands Act, ("O.C.S.L.A."), 43 U.S.C. §1331 *et seq.*, in order to bring the first available drilling rig onto its lease to drill the initial well, (the "BOEM Denial"). App. 82a-84a.

Petitioner ATP, a respected participant in the U.S. offshore oil and gas industry, has expended hundreds of millions of dollars in the domestic economy, rather than in foreign shipyards. ATP drills safe development wells, having, by its own initiative, long ago instituted redundant safety measures that to this day still exceed the current BOEM requirements.

B. Factual Background.

1. The Lack-of-Rig NTL.

When ATP submitted its request for a lease extension on July 25, 2006, called a Suspension of Operations or "SOO" under BOEM regulations, the BOEM had in effect a temporary policy that liberalized the granting of such lease extensions because the entire offshore industry was suffering a worldwide shortage of available drilling rigs, exacerbated in the Gulf of Mexico by the extensive damage caused by Hurricanes Katrina and Rita.

The policy had been issued on February 10, 2006, in the form of an agency policy document, Notice to Lessees NTL No. 2006-G02, referred to here as the "Lack-of-Rig NTL." App. 75a-78a. The Lack-of-Rig NTL consisted of two distinct portions: (1) a section setting forth the temporary policy being implemented, including its three express requirements; and (2) a preamble discussing the pre-existing policy for granting SOO extensions as a comparative backdrop for the purpose and scope of the temporary policy. *Id.*

The pre-existing regime under the previous policy required a lessee to have completed every aspect of preparing to drill before the lease termination date. App. 76a-77a. In sharp contrast, the Lack-of-Rig NTL, in recognition of the lack of presently available rigs, allowed an SOO where the lessee's rig contract did not call for drilling to commence before the lease terminated. App. 77a. In other words, the fundamental purpose of the Lack-of-Rig NTL was to allow an extension where a lessee could only contract for a rig to begin drilling *after* the lease would have otherwise terminated.

2. ATP's request for an SOO after months of preparation for drilling in coordination with the BOEM.

The lease at issue, Lease OCS-G 16662, in Block 943 of the Mississippi Canyon Area of Offshore Louisiana in the Gulf of Mexico, (hereinafter "MC 943"), was originally granted to a domestic subsidiary of an Australian conglomerate effective August 1, 1996 and was in its primary term until July 31, 2006, which was the effective lease termination date in the absence of drilling. App. 8a. MC 943, which is located in deepwater, was never developed by its original owner and has lain fallow since 1996. App. 87a. ATP purchased a majority interest in MC 943 on May 17, 2006 at a substantial cost. App. 86a. On May 23, 2006, the BOEM approved ATP as designated operator. On July 24, 2006, ATP acquired the remaining interest in MC 943. *Id.*

ATP is in the business of promptly bringing offshore leases into production, on a short turn-around, that were originally issued to other lessees who did not produce them. App. 87a. This short turn-around is necessary because the decision by the original lessee to forego drilling normally takes place very late in the lease's life. By successfully bringing such leases to production, ATP serves a particular and strategically valuable niche in the offshore oil and gas industry by producing oil and gas that would have otherwise been stranded. Since its inception in 1991, the company has had an exceptionally strong development success record of 98 percent in taking federal leases to production that were previously undeveloped and non-producing. *Id.*

The record evidence is undisputed that ATP diligently pursued the drilling of the first well on MC 943 prior to the approaching lease termination on July 31, 2006. App. 87a-98a. It did so in continuous, often daily communication with the local BOEM Regional Office. The record is equally undisputed that, until the BOEM Denial, the local BOEM personnel likewise worked in full cooperation with ATP while it pursued its plans to drill. *Id.*

Even prior to closing on its acquisition of MC 943, ATP began negotiations to retain a drilling rig to commence operations prior to the end of the lease's primary term. In April 2006, ATP initiated discussions with Diamond Drilling Company ("Diamond") involving the capability of the semi-submersible *Ocean Quest* to drill a well in the 4,400 foot water depth on MC 943. App. 88a. In response, Diamond forwarded an extensive internal engineering analysis that the *Ocean Quest* could drill

a well in this water depth. *Id.* After additional meetings, on June 1, 2006, ATP and Diamond executed a Domestic Daywork Drilling Contract – Offshore for the use of the drilling rig *Ocean Quest* for 180 days (the "Daywork Drilling Contract"). App. 89a. The Daywork Drilling Contract was in the form of a master work agreement, a form of contract used throughout the oil and gas industry.

In spite of its execution of the Daywork Drilling Contract, Diamond continued to express concerns in light of its devastating experience with Hurricanes Katrina and Rita in the prior hurricane season; and, in mid-June 2006, ATP asked Diamond to consider an alternate plan for the *Ocean Quest* to drill a shallow well to conductor pipe depth, run casing and temporarily abandon the well (hereinafter the "TA Well"). *Id.* Diamond responded affirmatively. *Id.*

In its continuing efforts to keep BOEM apprised, on June 30, 2006, ATP asked the BOEM to confirm that ATP's commitment to drill the TA Well would provide the basis for an SOO if circumstances did not allow the *Ocean Quest* to move to MC 943 before the lease expiration date. App. 89a-90a. After communications to find the appropriate officer, in a written email on July 14, the BOEM Regional Supervisor approved the TA Well as a leaseholding activity: "We consider drilling out of drive pipe (spudding) with a rig that is capable of drilling to TD to be a lease holding activity." App. 90a-91a. The Regional Supervisor reiterated the approval in a later email response that day: "Your planned activity is a lease holding activity since the rig is

capable and you are drilling and setting conductor." App. 91a.

In the face of Diamond's concerns, ATP also pursued an alternate strategy of trying to contract another rig while still diligently coordinating with Diamond. ATP made at least eight such separate, fruitless attempts to contract another rig with other drilling contractors. App. 96a-98a.

Given the BOEM's authorization that drilling the TA Well would be a lease holding event, ATP continued to diligently pursue the plan with Diamond to drill the TA Well, making significant expenditures of both money and personnel time. On July 18, 2006, Diamond confirmed in a written letter to use the *Ocean Quest* under the Daywork Drilling Contract to drill the TA Well at MC 943 once the mooring plan was finalized. App. 93a.

However, because (1) no other rig was available, (2) the contracted starting time for the *Ocean Quest* specified the finalized mooring plan, which would take until after the MC 943 lease terminated, and (3) strong ocean currents arose that prevented safe rig movement and mooring, ATP filed a request for a lease extension or SOO.

ATP's request consisted of two letters, dated July 25 and supplemented on July 27, 2006. App. 94a-98a. Its request expressly complied with the three explicit requirements set forth in the Lack-of-Rig NTL: (1) a survey of offshore rigs to ensure that no alternate rig could be available before the *Ocean Quest*; (2) a verification of the drilling contract for the *Ocean Quest*; and (3) a proposed date to commence drilling within 60 days. *Id.* In particular, the July 27, 2006 letter recounted the efforts of ATP

to secure a drilling rig for MC 943 from other Gulf operators, describing ATP's verbal contacts with BP, Kerr-McGee and Hydro and written requests to five additional drilling companies. App. 96a-98a.

ATP continued to keep in frequent contact with the BOEM regional personnel, and on August 17, 2006, after the primary term of the lease had expired, nine representatives of the BOEM met with ATP to discuss the status of the request for an SOO on MC 943. App. 100a. The BOEM's own records of the meeting show that not only were the BOEM personnel still looking on ATP's request as valid, they tentatively decided to grant an SOO in light of ATP's possibility to secure another rig, which was communicated to ATP informally later that day. App. 100a-101a.

The BOEM records also show that, on the evening of August 17, after the meeting with ATP, one of the BOEM employees who attended the meeting sent an email to the other attending employees in order to lobby against their decision to grant ATP its SOO extension. App. 79a-81a. In this email, the employee does not reference the Lack-of-Rig NTL or its purpose or requirements, but rather bases his lobbying on his personal opinion that ATP's request was merely "ATP being ATP" for such things as filing "at the last minute" and incompetently, if not disingenuously, discussing the prevailing ocean currents. App. 80a.

3. The BOEM Denial.

Notwithstanding the months of coordinated communication and the August 17 meeting and

informal offer, in a complete about-face, on August 29, 2006, the BOEM issued a written Denial of ATP's request. App. 82a-84a. The BOEM Denial does not reference the operative policy in the Lack-of-Rig NTL or its requirements. *Id.* Rather, the BOEM Denial stated it was based on a single ground, that is, that ATP did not have two particular administrative approvals, an EP and APD. App. 83a.

As the agency has ultimately admitted, these approvals were only required for an extension under the pre-existing policy discussed in the NTL's preamble section. Thus, the BOEM Denial merely applied the pre-existing policy to ATP's request and ignored the operative policy in the Lack-of-Rig NTL as thoroughly as if they had torn off the page of the NTL after the preamble.

Further, the email sent by the BOEM employee on the evening of the August 17 meeting with ATP confirms that the BOEM frontline personnel did not discuss or even give recognition to the Lack-of-Rig NTL while considering ATP's request. App. 79a-81a.

Notably, the BOEM written Denial expressly recognized that ATP had the *Ocean Quest* under contract. App. 82a.

4. ATP's appeal to the IBLA.

Because these two administrative approvals upon which the Denial was based were not requirements in the Lack-of-Rig NTL's temporary policy, but indeed would contradict its very purpose, ATP appealed the BOEM's Denial to the Interior

Board of Land Appeals ("IBLA" or "Board") within the Department of the Interior. App. 102a. As an integral part of its appeal, ATP requested a fact-finding hearing before an Administrative Law Judge ("ALJ") to adjudicate whether any factual support existed for the BOEM Denial, including evidence of the actual conduct by the BOEM's personnel at the time of the agency decision to deny ATP's request.

Notably, the BOEM Answer to ATP's Supplemental Statement of Reasons affirmatively justified its Denial in part on the assertion that ATP had a drilling contract.

On January 4, 2008, the Board issued a Decision (the "Decision" or "Board Decision") refusing the request for an ALJ hearing and upholding the Denial on the ground set out in the BOEM's Denial. App. 37a-55a.

C. Previous proceedings on judicial review.

ATP sought judicial review in the United States District Court for the Eastern District of Louisiana on the grounds that (1) the IBLA abused its discretion in refusing to hold a fact hearing before an ALJ despite ATP's identification of several material fact issues, necessary to support the BOEM's decision and not adequately addressed in the existing record; and (2) the BOEM's Denial and the Board's rote upholding of it were arbitrary and capricious and contrary to law because their only stated basis, that ATP failed to obtain two specific administrative approvals, would be fatally contrary to the Lack-of-Rig NTL and was not a requirement of the NTL or any other authority cited by the agency.

The basis for federal jurisdiction before the District Court as the court of first instance was pursuant to 28 U.S.C. §1331, the O.C.S.L.A. and the APA.

On initial judicial review and then on appeal, the Defendants offered ever changing, often contradictory interpretations of both the agency's own policy and of ATP's application thereunder. Before the District Court, the Defendants argued that NTL 2006-G02 did not establish a new procedure for obtaining an SOO, instead positing that the Lack-of-Rig NTL must be "read in its entirety", (despite the admitted failure in the Board Decision to even mention the operative text of the Lack-of-Rig NTL) and that such an "entirety" interpretation justified the BOEM's application of the pre-existing requirements for the administrative approvals even under the new Lack-of-Rig NTL.

The District Court did not rule on this substantive ground. Rather, it upheld the BOEM and the Board on an entirely new theory, neither raised nor relied on by either of them as the basis for their respective decisions, namely, that ATP did not have a drilling contract at all:

> "[t]herefore, notwithstanding that ATP did not have an approved EP and APD, there is no genuine issue of material fact that *ATP did not meet the requirement that a contract to begin drilling operations had been executed*" App. 53a (emphasis added).

This issue had been raised by the Defendants' appellate counsel for the first time in their Cross-Motion for Summary Judgment.

On appeal to the Fifth Circuit, the Defendants proffered another entirely new, contradictory explanation of NTL 2006-G02, after acknowledging that the Lack-of-Rig policy *did* present a new, separate basis for obtaining a lease extension that did not require an EP or APD. The Agency's *new* theory, presented by appellate counsel, was that the Lack-of-Rig NTL was a two-prong policy and that the applicant was required to elect which prong of the NTL they were applying under. It was an appellate argument that openly contradicted the Agency's argument before the District Court that the policy must be read in its entirety. More concerning, it literally re-wrote the NTL to fabricate the dual prong structure and created an application process out of whole cloth that never appeared in the Lack-of-Rig NTL itself.

The Fifth Circuit upheld the District Court in an opinion that reiterated, without discussion, the District Court's ruling on the lack-of-contract issue and also reiterated the BOEM's ground that ATP lacked the two administrative approvals. App. 1a-3a.

IV. REASONS FOR GRANTING THE WRIT

This Petition arises at the critical intersection between due process and administrative law. It affords this Court the opportunity to address two issues, upon which the Courts of Appeal have diverged, that are central to fair and just

adjudications in the administrative process: first, whether an agency internal adjudicative body may at once deny an opportunity for an evidentiary hearing while reaching outside the administrative record to affirm an agency decision; and, second, when and how an agency may reinterpret and reinvent its policies. In each instance, the Court of Appeals for the Fifth Circuit has afforded the Department of Interior broad latitude to tailor the facts and recast its own policy, respectively, in ways that are fundamentally inconsistent with prior decisions of this Court, other Courts of Appeals and basic notions of due process and fair play. Because the stakes are enormous, not simply for ATP but also for the integrity of the administrative process, these questions merit this Court's scrutiny.

First, this matter presents a case study of an agency, the Department of the Interior, that refused to engage in meaningful compliance with its obligations under the APA to fairly and independently scrutinize what, by any measure, was a simple, but plain error by frontline administrative personnel by ignoring the existence of their newly issued policy. Instead, the Defendants engaged in concerted action that effectively denied ATP's rights to have this error reviewed and corrected under the APA. This case presents a matter of growing significance because governmental responsibilities of all three branches, executive, legislative and judicial, are increasingly devolving to the federal administrative agencies and this trend will only accelerate in areas of health and energy regulation.

Specifically, when ATP appealed the written Denial by the frontline BOEM personnel on grounds

that it fundamentally contradicted the express terms and stated purpose of the Lack-of-Rig NTL, the Department, through its Board, refused to hold a fact hearing and then upheld the BOEM Denial on the same erroneous grounds stated in the Denial, but also included in its Decision a purported finding on an issue that had never been previously raised. App. 33a-34a. The Board's refusal to hold a hearing prevented ATP from adjudicating the substantive errors of the stated reason for BOEM Denial.

Equally harmful, the Board's refusal to hold a hearing effectively hid from ATP the factual basis upon which the District Court subsequently ruled, (that ATP lacked a drilling contract), until it emerged as an incidental statement in the Board's Decision *after* the time ATP could address it in the administrative record. *Id.* This incidental statement contradicted the only previous statements and conduct by the BOEM and its frontline personnel that ATP *had* a drilling contract. The Board's statement, in what would be considered *dicta* were it a court, was even contrary to BOEM's admission in its Answer that ATP had a drilling contract. The Board's refusal to hold a fact hearing guaranteed there would be no opportunity for ATP to discover the existence of the issue and to challenge it on a complete administrative record with findings by an ALJ.

This Court must review the standards, or lack thereof, upon which both of the courts below uncritically relied in validating the Board's *post hoc* contradiction of the BOEM's prior conduct as the final agency action subject to review. In doing so, both courts allowed the Defendant Board to diverge

from the prior conduct and stated position of its subordinate agency without a reasoned justification or substantial evidence in the record. Thus, the courts below applied standards that were not only in conflict with the express standards recognized in the D.C., Ninth and Seventh Circuits, which require clear articulation of any such divergence, but also with the clear prior pronouncements of this Court.

The action by the Board, ratified by both courts below, effectively prevented the development of a complete record in evasion of the *Whole Record Doctrine* in §706 of the APA as required under *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). App. 63a-64a. The courts below relied on a stray statement by the Board that was not supported by substantial evidence in the context of the entire record and thus violated the fundamental holding of *Universal Camera*, 340 U.S. at 487-88. Just as importantly, this reliance evaded the fundamental policy of this Court's *Chenery Doctrine* (*S.E.C. v. Chenery Corp.*, 318 U.S. 80 (1943)) because the courts below upheld the Defendants on a basis not put forth by the Defendants themselves at the only time that could be relevant to the process of judicial review on the administrative record.

Second, the Secretary is required by O.C.S.L.A. (43 U.S.C. §1334 (a)(1)) to provide, by regulation, for the issuance of extensions for oil and gas leases, and has done so under existing BOEM regulations and policy statements. App. 65a-66a. The issuance of oil and gas leases on federal lands, where the federal government receives substantial sums, often in hundreds of millions of dollars in

bonuses and royalty payments, is a proprietary rather than purely governmental function. The BOEM's Lack-of-Rig policy was an appropriate solution to liberalize the pre-existing policy in response to the unprecedented rig shortage that existed throughout the industry especially after Hurricanes Katrina and Rita.

However, the BOEM implemented this Lack-of-Rig policy through the inherently vague, imprecise and indeterminate narrative-form NTL that lacked the requisite clarity to prevent arbitrary application by the BOEM personnel when they chose to do so in response to ATP's request. In conflict with standards recognized in the D.C., Seventh and Ninth Circuits, the courts below erroneously upheld the Defendants' arbitrary and capricious *post hoc* interpretations of its Lack-of-Rig NTL. In the D.C., Seventh and Ninth Circuits, such *post hoc* revisions to an established interpretative policy can only be made upon a formal and published change or repudiation to the policy by the agency. Here, in contrast, the Fifth Circuit allowed the Defendants to revise the Lack-of-Rig NTL in multiple ways after its implementation, many of which occurred on this current appeal, on an *ad hoc* basis without prior notice or publication.

This Court has never before reviewed the substantive use of this regulatory vehicle known as the Notice to Lessees. It is used extensively by the BOEM in regulating federal OCS oil and gas leases, yet there is dearth of any judicial scrutiny. The BOEM requires strict compliance by operators and lessees with its NTLs, and yet, in the present case, it arbitrarily deviated from its own NTL-established

policy and sought to cover its deviation under the cloak of the indeterminate structure and imprecise language of the Lack-of-Rig NTL. The BOEM may not and should not be allowed to exploit its own vagueness and lack of clarity in the form of NTLs and still be in compliance with the APA. It is a matter of significant national interest for this Court to scrutinize BOEM's own compliance with its NTL-implemented policies, especially at this time of regulatory turmoil and change in the Gulf of Mexico.

For these reasons, Petitioner ATP respectfully requests that this Court accept its petition for writ of certiorari.

V. ARGUMENT

A. Question Presented No. 1.

Notice of the issues and facts that an agency will consider in exercising its adjudicatory function is a fundamental right of the regulated party. A party is entitled to know the issues on which decisions will turn and to be apprised of the factual basis on which the agency relies for a decision so that he may have a fair opportunity to rebut it. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288, n. 4 (1974).

Just as fundamentally, an agency action can only be upheld on the basis set forth by the agency itself. *S.E.C. v. Chenery Corporation*, 332 U.S. 194, 197 (1947); *Motor Vehicle Mfgs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). And, an agency's statement must be supported by substantial evidence on the whole record. *Universal Camera*

Corp., 340 U.S. at 488. Any change from prior rules, decisions, statements or policies must be supported by reasonable explanation. *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Bd. Of Trade*, 412 U.S. 800, 808 (1973).

ATP was denied prior knowledge of the basis upon which the agency would ultimately be upheld by both courts below and, accordingly, denied a meaningful opportunity to test the underlying factual premise, namely, ATP's purported lack of a drilling contract. It was also denied the right to adjudicate the substantive errors underlying the Defendants' denial of ATP's request and to show that the BOEM Denial was itself a pretext with no connection to the actual decision making of the BOEM personnel.

The record is undisputed that the conduct and statements of the Defendants prior to the issuance of the Board's Decision were all consistent that ATP *had* a drilling contract, and shows that the isolated statement in the Board's Decision that ATP had no contract fundamentally contradicted, without prior notice to ATP, the prior actions, statements, writings, and pleadings of the BOEM.

The Board's Decision is consistent with the BOEM's express position that it took before the Board to support its Denial: the Decision and underlying analysis focused exclusively on the justifying the alleged requirement for the two administrative approvals cited as the basis for the BOEM Denial. App. 25a-33a.

However, like the proverbial dog in the manger, buried in the Board's discussion criticizing ATP's failure to obtain permits based on the pre-

existing SOO requirements that required drilling before lease termination, the Decision included the unsupported statement that ATP did not have a drilling contract at all. App. 34a. This isolated statement was not connected to any evidence, was incidental to the Board's Decision, which turned on the alleged requirement for permits, and was thus, mere *dictum*. It flatly contradicted the BOEM's previous conduct and statements on the point. Worse, having denied ATP a fact hearing before an ALJ, the Defendants could not, within the confines of fair notice and due process, make a finding on such an issue of mixed law and fact. *See, e.g., Ham Marine, Inc. v. Dresser Indus., Inc.*, 72 F.3d 454, 458-459 (5th Cir. 1995) ("Whether a contract exists involves both questions of fact and questions of law.")

Yet, upon judicial review, this stray statement, made without prior notice and in complete contradiction to the previous position of the subordinate agency, became the sole basis upon which the District Court upheld the Board Decision. App. 52a-53a. This conclusion was repeated by the Court of Appeals with no discussion of the basis. App. 3a. This Court has not previously been presented with the present circumstance where an agency's internal appellate board, after denying an appellant a fact hearing, introduces a new conclusion – in this case, a legal conclusion that must be based on necessary factual predicates of contract formation – that contradicts the previous conduct of its subordinate agency at the time it was engaged with the appellant during the administrative process and

does so with neither reasoned explanation of the divergence nor substantial evidence.

The Fifth Circuit affirmed the District Court and the IBLA, each of which had ruled on different grounds from one another. The Panel upheld the District Court's holding regarding the alleged lack of a contract. It affirmed the BOEM and IBLA on their position that the denial of the SOO was justified because ATP lacked an EP and APD, (notwithstanding Defendants' admission before the Fifth Circuit that these permits were not required under the Lack-of-Rig NTL). In doing so, the Fifth Circuit Panel applied standards for the reviewing court's use of the record beyond the use made by the agency itself that are in conflict with those in the Courts in the D.C, Seventh and Ninth Circuits in two distinct ways. In both, the result eschewed the very purpose of critical scrutiny through effective judicial review.

First, the Ninth, Seventh and D.C. Circuits apply standards that strictly require that any change or contradiction by an agency's appellate body of the action of a subordinate agency must be adequately explained on the full record. Notably, every reported case from these circuits involves cases where a full hearing was held before an ALJ with a full record of issues and findings. *See, e.g., Hjelvik v. Babbitt*, 198 F.3d 1072, 1076 (9th Cir. 1999)(where the Ninth Circuit upheld an IBLA decision that contradicted the findings of subordinate agency personnel, but where the proceedings included an ALJ hearing and where the court found that the IBLA's decision was supported by substantial evidence). *See also N.L.R.B. v.*

Indianapolis Mack Sales & Serv., Inc., 802 F.2d 280, 285 (7th Cir. 1986) and *Alaska Professional Hunters Assn. v. F.A.A.* 177 F.3d 1030, 1035 (D.C. Cir. 1999).

Here, in contrast, the Fifth Circuit did not require any reasoned justification from the Defendants for the Board's *post hoc* divergence from the prior conduct and stated reasons of the subordinate agency, the BOEM.

Second, these Circuits also apply strict standards to ensure that judicial review is limited to the administrative record, and not *de novo*, and that a court is not permitted to look beyond the administrative record, i.e., the evidence and statements presented by the agency itself, in order to reach an independent justification of an agency action. In this, these Circuits require that an agency be upheld only on reasons given by the agency itself based on substantial evidence. *See, e.g., Indianapolis Mack*, 802 F.2d at 285 (holding that the decision of an administrative agency, "unlike those of a district court, cannot be sustained on a ground appearing in the record to which the agency made no reference; to the contrary, the Board's decision stands or falls on its express findings and reasoning."). This position is consistent with what this Court has held. *See, e.g., N.L.R.B. v. Metropolitan Ins. Co.*, 380 U.S. 438, 444 (1965)("For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress

has set aside exclusively for the administrative agency.' ") (quoting *Chenery*, 332 U.S. at 196.

The Seventh Circuit clearly recognizes that the decision of an administrative agency, "unlike those of a district court, cannot be sustained on a ground appearing in the record to which the agency made no reference; to the contrary, the Board's decision stands or falls on its express findings and reasoning." *Indianapolis Mack*, 802 F.2d at 285; *see also, Beloit Corp., Castings Div. v. N.L.R.B.*, 857 F.2d 1154, 1156 (7th Cir. 1988).

Seventh Circuit panels have expressly warned that courts, in deferring to an agency's expertise, should not abrogate their responsibilities for oversight of agencies: "[a]lthough this standard of review accords the Board considerable discretion, it does not mean that we will simply rubber-stamp its decisions, thereby substituting judicial abdication for judicial review." *Indianapolis Mack*, 802 F.2d at 283.

In the present case, in contrast, the Fifth Circuit, as well as the District Court, upheld the agency on a single statement that was not only in the nature of *dicta*, but was neither supported by a reason given by the agency itself nor by substantial evidence. In fact, the District Court presented an independent justification different from that presented by the agency itself. Because this practice on judicial review is in conflict with that allowed in the D.C., Seventh and Ninth Circuits, this Court must resolve this conflict.

The refusal of the Fifth Circuit Panel to review the Defendants' actions under the same standards of the D.C., Seventh and Ninth Circuits has worked three distinct harms on ATP.

First, a federal offshore oil lease is a private right, the deprivation of which requires basic due process including notice of the issues on which an agency's decision will turn and the opportunity to respond on the record to those issues. *See, e.g., Bowman Transportation,* 419 U.S. at 288. A lease suspension or SOO is a right and an inherent component of an offshore lease, prescribed by the O.C.S.L.A., 43 U.S.C. §1334 (a)(1), and not a discretionary, gratuitous act on the part of BOEM. App. 65a-66a. "When the United States enters into contract relations, it is expected to abide by the terms of that contract, and "its rights and duties therein are governed generally by the law applicable to contracts between private individuals," *United States* v. *Winstar Corp.,* 518 U.S. 839, 895 (1996) (quoting *Lynch v. United States,* 292 U.S. 571, 579 (1934).

To the degree the Board has discretion to deny a factual hearing, it is not unlimited. The Board may not deny a hearing when the disputed issues may not be resolved through an examination of written submissions, (*see, e.g., Orion Reserves Limited Partnership v. Salazar,* 553 F.3d 697, 707-08 (D.C. Cir. 2009); *Codd v. Velger*, 429 U.S. 624, 627-28 (1977) or when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them, (*Woods Petroleum Co.*, 86 I.B.L.A. 46, 55 (1985)). An agency can satisfy due process standards without a hearing where it can fairly find facts on the existing record without a hearing. However, the APA applies the special rigor of a hearing to agency decisions of the type made by

BOEM in considering ATP's SOO request, as reflected in APA §558. ("[D]ue regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time,"; before a license is withdrawn, revoked, or annulled, the agency "shall set and complete proceedings, proceeded by (1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements.) 5 U.S.C. §§551(8) and 558. App. 67a, 71a-72a.

In the present case, the Board simply denied ATP's request for a hearing that was necessary to uncover and adjudicate the very issue on which both courts below ruled. Congress has not given the discretion to any agency to make pronouncements outside of and unfettered by the record after denying appellants the opportunity to develop a record. Such discretion would undermine the broad deference given or which should be given to agencies to lawfully exercise their expertise. *See United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (J. Scalia, dissenting).

Second, the Board's statement about ATP's drilling contract in the Board's Decision also violated the APA's *Whole Record Doctrine*. The APA requires a review of "the whole record" to determine whether the challenged decision should be set aside as "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706. The *Whole Record Doctrine* was enshrined by this Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), which held that the administrative record must be adequate to enable a

reviewing court to fulfill its APA §706 duties. 401 U.S. at 419; App. 63a-64a. The Board's statement was not connected to or supported by even the portion of the Decision it appeared in; thus, any use of such a statement is in outright violation of this court's pronouncement in *Universal Camera* which, since 1951, has prohibited use of isolated statements taken out of context of the entire record, but rather requires that substantial evidence be determined only in the context of the entire record. *Universal Camera,* 340 U.S. at 488 ("[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight").

Third, the Board's reversal of the BOEM's position regarding what became a material issue only upon judicial review, after the record closed and with no opportunity for ATP to respond, violates the fundamental policy underlying the doctrine established by this Court in *Chenery Corp.*, 318 U.S. at 94-95, holding that discretionary administrative action will only be upheld on grounds articulated by the agency in the record. While preserving agencies' authority to exercise the discretion delegated by Congress and preventing courts from substituting their own policy for that of the agency, the *Chenery Doctrine* limits agency power to make policy outside of public scrutiny. *Chenery* is fundamentally violated where the agency inserts new factual conclusions in its Decision after the record underlying the Decision closes.

B. Question Presented No. 2.

The courts below erred in upholding the Defendants' *post hoc* revisions to the BOEM's Lack-of-Rig policy that nullified its purpose. These *post hoc* revisions were made possible by the inherent lack of sufficient clarity in the regulatory vehicle known as the Notice to Lessees, or "NTL". As this Court has made clear in other contexts, fair notice is a fundamental component of due process. Permitting the government to reinvent the rules in mid-stream would be unthinkable in a civil or criminal action based upon a statute; it is no less so in the administrative process. As we set forth below, the Court of Appeals in this case has afforded the BOEM vast latitude that is inconsistent with due process, prior decisions of this Court, and the approach taken by other Circuits. Because the BOEM uses NTLs extensively in administering and regulating federal O.C.S.L.A. leases and the offshore industry of lessees, operators and service companies holding and operating these leases, it is a matter of significant importance.

The BOEM publishes a number of NTLs annually to provide substantive guidance and explanations of agency regulations and policies to operators and lessees pursuant to the express provisions of 30 C.F.R. §250.103. App. 73a-74a. As a point of reference, the BOEM has published a series of NTLs in the immediate aftermath of the *Deepwater Horizon* incident to impose new safety and reporting requirements on Gulf operators and lessees, including NTL Nos. 2010 N05 through N10. While NTLs may be an effective tool for BOEM's

administration of this crucial industry when drafted and implemented properly and applied consistently, the present case highlights the inherent shortcomings of the NTL format. This format allows, in fact is premised on, an unstructured lengthy narrative that has no safeguards to ensure enforceable clarity. Therefore, it is susceptible to and invites *post hoc* variances, inconsistencies and revisionist interpretations in actual application.

The Lack-of-Rig NTL was BOEM's attempt to use this quasi-regulatory vehicle to responsibly address the unquestionable emergency caused by the shortage of drilling rigs in the Gulf of Mexico due to Hurricanes Katrina and Rita. When it is read fairly and plainly, the Lack-of-Rig NTL implemented a temporary policy that was a reasonable and highly appropriate response to this emergency. This appeal is not a challenge to the validity of the Lack-of-Rig NTL policy.

Rather, we question the Defendants' misuse of the inherent shortcomings of the Lack-of-Rig NTL after it was implemented to arbitrarily and capriciously deny its policy to Petitioner ATP and then to avoid effective judicial review under the APA.

The Lack-of-Rig NTL, as is typical for these documents, was issued in a multi-page narrative format. The short operative section with the requirements granting an SOO under the new Lack-of-Rig policy appeared on and only comprised a portion of the second page. App. 77a. A lengthy preamble was included that discussed, for comparison, the pre-existing policy for granting those lease extensions. App. 75a-77a.

Because NTLs are issued unilaterally by BOEM, without input from and dialogue with industry stakeholders, this narrative format inherently lacks the distilling and corrective benefits of notice and comment rulemaking. This Court has previously recognized that the notice and comment process was "designed to assure fairness and mature consideration of rules of general application." *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). The process allows the agency to "educate itself before adopting a final order." *Pennzoil Co. v. Fed. Energy Regulatory Comm'n*, 645 F.2d 360, 371 (5th Cir. 1981). In addition, public notice requires the agency to disclose its thinking on matters that will affect regulated parties. *See, e.g., United States v. Dean*, 604 F.3d 1275, 1278 (11th Cir. 2010).

Defendant Interior has long recognized the importance of and committed itself to public participation in rulemaking. *See* Secretarial Statement, dated April 12, 1958, adopting a policy of complying with notice-and-comment procedures when feasible, notwithstanding APA's "public property" exception (5 U.S.C. §553(a)(2)), subsequently reaffirmed in a 1971 "Notice" published in the Federal Register declaring the Department's policy ". . . to give notice of proposed rulemaking and to invite the public to participate in rulemaking in instances where not required by law . . . to the fullest extent possible." App. 68a-70a.

In contrast, the NTL, unilaterally issued by the BOEM, lacks the benefits of public input and comment, including the requisite clarity and accountability that could prevent subsequent arbitrary and capricious re-interpretation and

inconsistent application of NTL-implemented policies. The BOEM requires strict conformance with its NTLs; yet, in the current case, when the agency's frontline personnel and the Board simply ignored their own Lack-of-Rig policy in regard to ATP, the Defendants hid the failure from review by fabricating and offering radically different re-interpretations of the Lack-of-Rig NTL throughout judicial review. The record here is simple and clear. The Defendants have, uniformly and without exception, ignored the operative portion of the Lack-of-Rig NTL. Rather, they have based every one of their ever changing positions on the non-operative preamble of the Lack-of-Rig NTL, from the original BOEM Denial to the final iteration of their appellate arguments.

This Court has never examined the BOEM's extensive use of NTLs to regulate the critical offshore oil industry and, therefore, has never examined the inherent shortcomings of NTLs that allow the agency to avoid lawful accountability for their actions. Also, there is a lack of clarity among, and a critical need to resolve a conflict between, Circuits as to the standards to which an agency should be held in promulgating changes to existing policy statements, such as NTLs, and in applying them consistently and fairly.

In this case, as opposed to fair and consistent application to ATP's request, the BOEM ignored the operative portion of the NTL, which it had no discretion to do. The IBLA Decision compounded the error by entirely failing to engage in a substantial inquiry of the BOEM Denial by considering an important aspect of the problem. 5 U.S.C. §706(2)(A),

App. 63a-64a; *Motor Vehicle*, 463 U.S. at 43-44. The record is also undisputed that the Defendants used the NTL's inherent lack of clarity to offer new, even contradictory interpretations of the Defendants' policy to both the District Court and the Fifth Circuit.

Having published the Lack-of-Rig NTL to implement a reasonable and appropriate response to a catastrophic situation, BOEM, including its front-line personnel, was bound by the terms of the NTL, including its stated procedures and exceptions, unless and until declared invalid or changed by the BOEM itself upon reasoned analysis and justification. *Atchison*, 412 U.S. at 808. The only alternative is that the Lack-of-Rig NTL (and all other NTLs) are meaningless non-binding policies.

The BOEM and the Board's disregard of and inconsistent application of the Lack-of-Rig NTL illustrate the lack of consistent statutory or judicial accountability to which the BOEM is held in its use of NTLs. To the limited extent courts below have examined the issue, they have varied in the standards of accountability to which they have held agencies' changes to interpretive policy guidance documents. As described below, the standards followed by the Fifth Circuit in this present case are in sharp contrast with the highly specific standards articulated in the D.C. and Seventh Circuits. The D.C. Circuit standards, in turn, have been rejected by the Tenth Circuit.

The Fifth Circuit has recognized that "the failure of an agency to follow its regulations renders its decision invalid." *See, e.g., Gulf States Mfgs. Inc. v. N.L.R.B.*, 579 F.2d 1298, 1308 (5th Cir. 1978); *see*

also Envtl. Def. Fund v. Marsh, 651 F.2d 983, 1002 (5th Cir. 1981) (citations omitted) (Army Corps of Engineers is bound by the precepts incorporated in its own regulations); and *Chevron Oil Co. v. Andrus*, 588 F.2d 1383, 1386 (5th Cir. 1979), (citing *Service v. Dulles*, 354 U.S. 363, 372 (1957) (finding it an unremarkable proposition that an agency must abide by its own regulations)).

However, beyond these general principles of adherence to published regulations, the Fifth Circuit, in sharp contrast to the D.C. Circuit, has not established clear judicial guidance for what steps an agency must take if it is to deviate from published and implemented policy guidance.

The D.C. Circuit has held that, absent a formally promulgated and published change, an agency is bound to consistent interpretation of its own duly promulgated regulations, policies and procedures. *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997)(holding that once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking). *See also Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir.1997)(Where an agency promulgates rules via notice and comment rulemaking, it is free to modify its application of the rule, or to decline to apply the rule, *only after* exercising additional notice and comment rulemaking. A modification of an interpretive rule construing an agency's substantive regulation will "likely require notice and comment procedure.").

This D.C. Circuit standard was reinforced two years later in *Alaska Professional Hunters*, 177 F.3d at 1035-36, which held that an agency must give opportunity for notice and comment when it significantly revises a previous and definite interpretation.

The Seventh Circuit would also have rejected the Defendants' revisions to the Lack-of-Rig NTL, made or attempted for the first time on judicial review, under its standards of review. *Indianapolis Mack*, 802 F.2d at 285. ("We first note that these arguments made after the initial decision and in support of the application for enforcement are inherently suspect and do not merit our consideration . . . . An administrative agency's decisions, unlike those of a district court, cannot be sustained on a ground appearing in the record to which the agency made no reference; to the contrary, the Board's decision stands or falls on its express findings and reasoning.").

A split on this issue with the Tenth Circuit is noted in *United States v. Magnesium Corp. of America*, 616 F.3d 1129 (10th Cir. 2010), where *Magnesium Corp.* does not follow the holding in *Alaska Hunters.* While *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001) purportedly followed the *Alaska Hunters* reasoning, the failure by the Fifth Circuit Panel in the present case makes it clear that this position is not established law in the Fifth Circuit.

The lack of clear standards for accountability in the BOEM's application and interpretation of NTLs, as evidenced by the opinion of the Fifth Circuit in the present case, is increasingly

problematic as the BOEM relies extensively on NTLs for administering the O.C.S. leases. As a general rule, agencies are free to use NTL-type guidance documents to issue interpretive rules, but not substantive rules. *See, e.g., Mead Corp.*, 533 U.S. at 233-34. A rule or policy declaration that is substantive in nature generally requires notice and comment. *Shell Offshore*, 238 F.3d at 629. The BOEM, by its own regulation, may only issue NTLs for two limited purposes: to clarify, supplement, or provide more detail about certain requirements; or to outline what an operator or lessee must provide as required information in various submissions to BOEM. 30 C.F.R. §250.103, App. 73a-74a. Yet, the BOEM, in its extensive use of NTLs often explores the limits of what may be considered "interpretive" guidance, and the agency has been criticized on at least one occasion for improperly crossing this line in issuing NTLs. *Ensco Offshore Co. v. Salazar*, No. 10-1941, 2010 WL 4116892, *5 (E.D.La. Oct. 19, 2010) (finding that NTL-05 was a substantive rule that required notice and comment).

While ATP did not below, and does not now, dispute that NTL 2006-G02 was a duly promulgated and enforceable agency policy, the BOEM cannot have it both ways: it cannot issue guidance via use of NTLs and demand strict compliance from the operators and lessees it regulates, but then refuse to consistently abide by the plain-language terms of such NTL guidance.

The administrative record, the IBLA Decision, and the orders of the courts below in this case present a case study of how BOEM, through the vagueness and indeterminacy of the NTL, was

unimpeded in its refusal to follow the policy in its own NTL, and how the lack of consistent judicial standards for the use of such documents, allowed the BOEM to shield itself from accountability under APA standards of review. This Court should resolve the conflict among lower courts as to what procedural requirements apply to an agency that changes an interpretation of an existing NTL-type rule or that declines to apply such a rule consistently.

VI. CONCLUSION

Petitioner ATP respectfully requests that this Petition for a Writ of Certiorari be granted and that this Court review the questions presented above.

Respectfully submitted on this 28th day of February, 2011.

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